03-CV-03012-BR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DURAND "DEE" SPLATER and CARLA JOHNSON, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

v.

THERMAL EASE HYDRONIC SYSTEMS, INC., PLASCO MANUFACTURING, LTD., n/k/a UPONOR CANADA, INC., HOT WATER SYSTEMS NORTH AMERICA, INC., and UPONOR OYJ, also known as UPONOR GPOUP,

Defendants.

CASE NO. C03-3012C

ORDER

This matter comes before the Court on Plaintiffs' Motion to Remand (Dkt. No. 4). Having found that the current action does not fall within a federal district court's subject matter jurisdiction, the Court GRANTS Plaintiffs' motion.

I. BACKGROUND

This is a products liability action. The plaintiff individuals and entities are current or former owners of homes and structures with heating systems containing cross-linked polyethylene tubing which they refer to by the trade name "UltraPex." Plaintiffs allege that Defendants, manufacturers and distributors of UltraPex, have been marketing UltraPex "to consumers throughout Washington and the United States for years even though Defendants knew the tubing was not suitable for use in hydronic heating systems and did not conform to Defendants' representations and warranties." (Pls.' Compl. ¶¶ 2.3-2.9.)

Named Plaintiffs are residents of the State of Washington. They had originally filed this action in the Washington State King County Superior Court. As Defendants, Plaintiffs' complaint named several business entities, including Thermal Ease Hydronic Systems, Inc. ("Thermal Ease"), a Washington corporation that has been administratively dissolved. According to Plaintiffs' allegations, because they were unable to locate Thermal Ease's registered agent, they served process on the Secretary of Washington State as Thermal Ease's agent for that purpose.

Defendants removed the action to this Court claiming that the Court has original jurisdiction over the subject matter of this law suit under 28 U.S.C. § 1332(a) by virtue of the parties' diversity of citizenship. Plaintiffs timely filed the current motion requesting that the Court remand this case to the King County Superior Court, arguing that the removal at issue was improper under 28 U.S.C. § 1441(b) because Defendant Thermal Ease is a citizen of Washington state, which defeats § 1332(a)'s requirement of complete diversity between adverse parties. Defendants respond that in ascertaining whether diversity jurisdiction exists in this case, the Court should disregard Defendant Thermal Ease's citizenship because the company is not a real party to this controversy. In support of this contention, Defendants offer three alternative arguments: (1) Washington law bars any claims against a dissolved corporation unless such claims existed at the time of the dissolution; (2) Thermal Ease is a nominal party that has no stake in this litigation; and (3) Plaintiffs have failed to effectuate timely service of process on Thermal Ease. For the following reasons, the Court finds that Defendants' arguments have no merit and rules in Plaintiffs' favor.

## II. ANALYSIS

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511

U.S. 375, 377 (1994). Therefore, the removal statute, 28 U.S.C. § 1441(a), which authorizes a defendant to remove to federal court "any civil action brought in a State court of which the district courts of the United States have original jurisdiction," should be strictly construed against removal jurisdiction. *Ethridge v. Harbor House Rest.*, 861 F.2d 1389, 1393 (9th Cir. 1988). The defendant bears the burden of proving all grounds necessary to support removal. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566-67 (9th Cir. 1992).

Defendants removed this case from a Washington state court to this Court alleging that Plaintiffs' products liability claims fall within the Court's diversity-of-citizenship jurisdiction. The removal jurisdiction statute Defendants rely on provides that a civil action of which a district court has original jurisdiction based on diversity of citizenship "shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b) (2000). It is undisputed that Defendant Thermal Ease is a citizen of the State of Washington. Therefore, to prove that this action has been properly removed, Defendants must demonstrate that Thermal Ease is either not a proper party in interest or it has not been properly served with process.

**A. The Party in Interest Requirement**

Defendants advance two arguments in support of their contention that Thermal Ease is not a proper party in interest in this case. First, they argue that the Washington Business Corporation Act, Wash. Rev. Code §§ 23B.01-.900 (2002) ("WBCA"), bars all claims against a dissolved corporation unless such claims have accrued on or before the dissolution date.[1] Second, Defendants maintain that even if Washington law generally allows claims against dissolved corporations, the Court should nevertheless disregard citizenship of Thermal Ease because the company is a nominal party that has no stake in this litigation. The Court disagrees with Defendants on both points.

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[1] Plaintiffs and Defendants appear to agree that while the events triggering Plaintiffs' products liability claims occurred prior to an administrative dissolution of Thermal Ease, Plaintiffs' cause of action for injuries did not accrue until after the dissolution.

In Washington, a dissolved corporation retains its capacity to sue or be sued[2] while the corporation is winding up its business. The WBCA provides that "[d]issolution of a corporation does not . . . [p]revent commencement of a proceeding by or against the corporation in its corporate name." Wash. Rev. Code § 23B.14.050(2)(e) (2002). This provision is consistent with the Act's express mandate that the dissolved corporation continue its corporate existence for the purpose of collecting its assets, disposing of the corporation's property, discharging of debts, and conducting similar activities in the course of winding up the corporation's business. *See* Wash. Rev. Code § 23B.14.050(1) (2002).

Defendants acknowledge Thermal Ease's general capacity to be sued conferred upon it by the WBCA. However, they argue that the Act "allows a party to sue an administratively dissolved corporation only on those claims that exist at the time of dissolution." (Defs.' Opp'n at 5.) In support of this argument, Defendants cite the following provision of the WBCA:

> The dissolution of a corporation . . . by administrative dissolution by the secretary of state . . . shall not take away or impair any remedy available against such corporation, its directors, officers, or shareholders, *for any right or claim existing, or any liability incurred, prior to such dissolution* if action or other proceeding thereon is commenced within two years after the date of such dissolution.

Wash. Rev. Code § 23B.14.340 (2002) (emphasis added).

Defendants' argument misinterprets the reach of section 23B.14.340. Although that section sets a time limit on asserting pre-dissolution claims against a corporation, the statutory language does not suggest that section 23B.14.340 reduces section's 23B.14.050 broad authorization of commencement of actions against dissolved corporations solely to claims that had existed prior to the dissolution. *See Smith v. Sea Ventures, Inc.*, 969 P.2d 1090, 1093 (Wash. Ct. App. 1999) (noting that the official comment to section 14.06 of the Model Business Corporations Act, which Wash. Rev. Code §

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[2] According to Fed. R. Civ. P. 17(b), "[t]he capacity of a corporation . . . to sue or be sued shall be determined by the law under which it was organized." Since Thermal Ease had been incorporated in Washington, the law of that state governs Thermal Ease's capacity to sue and be sued.

23B.14.340 is based upon, "is not intended to cover claims which are contingent or arise based on events occurring after the effective date of dissolution."). Thus, the sole function of section 23B.14.340 is to provide a time limitation for alleging claims that had accrued before dissolution of a corporation. The language of section 23B.14.340 clearly points to the section's narrow reach: while the statute provides that the dissolution of a corporation "shall not take away or impair any remedy available against [the] corporation . . . for any right or claim existing, or any liability incurred, prior to [the] dissolution," it does not expressly state or imply that the dissolution "takes away" those claims against the corporation that were unknown at the time of the dissolution. In fact, the *Sea Ventures* court, having ascertained the meaning of section 23B.14.340, allowed the plaintiff to pursue a breach of contract claim against the dissolved corporation even though the claim was not ripe at the time of the dissolution. *See Sea Ventures*, 969 P.2d at 1093.

As the foregoing analysis demonstrates, the interpretation of section 23B.14.340 offered by Defendants finds no support either in the statutory language itself or in the decisions of Washington state courts. The Court therefore concludes that Plaintiffs' current products liability claims against Thermal Ease are unaffected by section 23B.14.340. Accordingly, the Court shall proceed to examine whether Thermal Ease is a nominal party to this litigation.

Based on the language of the federal removal statute, 28 U.S.C. § 1441(b), a district court may disregard citizenship of defendants who are nominal parties with nothing at stake although such defendants may have been properly joined in the action. *See Strotek Corp. v. Air Transp. Ass'n of Am.*, 300 F.3d 1129, 1133 (9th Cir. 2002); *Prudential Real Estate Affiliates, Inc. V. PPR Realty, Inc.*, 204 F.3d 867, 873 (9th Cir. 2000). The issue of whether a party has real interest in litigation for the purpose of diversity-of-citizenship jurisdiction normally appears to arise in a situation where an individual or an entity is either joined as a stakeholder in a dispute between other parties or when such persons prosecute or defend a claim on behalf of another. *See PPR Realty, Inc.*, 204 F.3d at 873 (explaining that a court should disregard citizenship of the parties "merely joined to perform the ministerial act of conveying the title if adjudged to the complainant" or where a party is a mere holder of the stakes of the dispute between other parties) (internal quotation marks omitted). In addition, courts and commentators have specifically opined that "[a] defendant is a nominal party if there is no reasonable basis for predicting that it will be held liable." *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 369 (7th Cir. 1993) (citation omitted); *see also* 15 James Wm. Moore et al., *Moore's Federal Practice* ¶ 102.15, at 102-27 (Matthew Bender 3d ed.) ("A-real-party-in-interest-defendant is one who, according to applicable substantive law, has the duty sought to be enforced or enjoined.").

Although it appears that the Ninth Circuit has yet to consider whether a dissolved corporation has sufficient interest in defending claims brought against it to be included in the diversity-of-citizenship calculus, at least two federal district courts have answered that question in the affirmative. *See Bejcek v. Allied Life Fin. Corp.*, 131 F. Supp. 2d 1109, 1113-14 (S.D. Iowa 2001); *Storr Office Supply Div., a Div. of Storr Office Env'ts., Inc. v. Radar Bus. Sys.-Raleigh, Inc.*, 832 F. Supp. 154, 157 (E.D.N.C. 1993). The relevant procedural facts of both cases closely resemble the facts of the case at bar.

For example, in *Bejcek*, the defendant corporations removed the plaintiffs' breach-of-contract claims to a federal court alleging, inter alia, that the claims fell within the court's diversity-of-citizenship jurisdiction. *See Bejcek*, 131 F. Supp. 2d at 1111. One of the defendants and one of the plaintiffs were citizens of the same state. *Id.* To prevent a remand of the case to the state court based on lack of complete diversity required by the removal statute, defendants argued that the non-diverse defendant, an administratively dissolved Iowa corporation, was merely a nominal party. *Id.* The court disagreed and ruled that the defendant's status as a real party in interest did not change by virtue of its administrative dissolution. *See id.* at 1113. The court advanced three reasons for its decision. First, under Iowa law, "an administratively-dissolved corporation retains its corporate existence for purposes of winding up and liquidating its business and affairs, which includes discharging its liabilities." *Id.* (citing Iowa Code Ann. § 490.1421(3) (West 1999)). Second, a pertinent Iowa statute provides that "[d]issolution does not prevent the commencement of a proceeding against a dissolved corporation." *Id.* (citing Iowa Code Ann. § 490.1405(2)(e) (West 1999)). Third, the dissolved corporation at issue was a party to the contract the breach of which the plaintiffs had alleged. *Id.* Summarizing the above three reasons, the court concluded that "[u]nder Iowa law, therefore, there is a reasonable basis to predict that [the defendant], dissolved or not, will be held liable for the claims in the petition." *Id.*

The legal and factual setting pertinent to the removal of Plaintiffs' products liability claims to this Court is no different than that in *Bejcek*. Like the defendant corporation in *Bejcek*, Thermal Ease had been administratively dissolved at the time of filing the petition for removal. Further, the Iowa statutes the *Bejcek* court relied on to find that the dissolved corporation was not a nominal party are virtually identical to the provisions of the WBCA pertinent to the current legal status of Thermal Ease. *Compare* Iowa Code Ann. § 490.1421(3) ("A corporation administratively dissolved continues its corporate existence but shall not carry on any business except that necessary to wind up and liquidate its business and affairs.") with Wash. Rev. Code § 23B.14.210(3) (2002) ("A corporation administratively dissolved continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs."); Iowa Code Ann. § 490.1405(2)(e) ("Dissolution of a corporation does not . . . [p]revent commencement of a proceeding by or against the corporation in its corporate name.") with Wash. Rev. Code § 23B.14.050 ("Dissolution of a corporation does not . . . [p]revent commencement of a proceeding by or against the corporation in its corporate name."). Finally, as it appears on the face of Plaintiffs' complaint, Thermal Ease had allegedly "designed, manufactured, warranted, advertised, sold and/or distributed UltraPex." (Pls.' Compl. ¶ 6.6.) Consequently, assuming that Plaintiffs' claims have factual and legal support, there is a likelihood that Thermal Ease will be held liable to Plaintiffs and therefore has a real interest in defending against Plaintiffs' claims.[3]

Defendants point out that in *American National Bank of Jacksonville v. Jennings Development, Inc.*, 432 F. Supp. 151 (M.D. Fla. 1977), a federal district court held that a dissolved corporation should not be considered a real party in interest in determination of complete diversity required for proper removal under 28 U.S.C. § 1441. That case, however, involved state law significantly different from the above-discussed provisions of the WBCA. As the *Jennings Development* court found, under Florida law, all actions against a dissolved corporation in essence should be brought not against the corporation itself, but against its directors-trustees. *See Jennings Development*, 432 F. Supp. at 152 (citing a Florida statute, currently Fla. Stat. Ann. § 48.101 (West 1994), requiring that service of process in an action against a dissolved corporation be made upon one of its directors-trustees). Based on this statutory scheme, the court held that for the purposes of diversity-of-citizenship jurisdiction, the dissolved corporation's citizenship should be determined by the citizenship of its directors. *See id.*

In contrast to Florida law, the WBCA authorizes law suits against a dissolved corporation in its corporate name and contains no requirement that service of process in an action against a dissolved corporation be made on its directors. In fact, under Washington law, an administratively dissolved corporation retains its registered agent, *see* Wash. Rev. Code § 23B.14.210(4) (2002), and is subject to the service of process rules generally applicable to all Washington corporations. Therefore, the *Jennings Development* opinion, which in any event constitutes only a persuasive authority for this Court, does not provide proper guidance on the issue of whether the Court should disregard Thermal Ease's citizenship in ruling upon Plaintiffs' motion for remand.

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[3] In an opposition to Plaintiffs' current motion, Defendants state that Thermal Ease was merely a distributor of the allegedly defective products. As such, Defendants argue, Thermal Ease may not be liable to Plaintiffs. The Court is not persuaded by this argument for three reasons. First, Defendants failed to factually substantiate their contention that Thermal Ease did not manufacture the products containing UltraPex. Moreover, Defendants' factual statement appears to be premature at this stage of litigation because no party has yet had the opportunity to conduct discovery. Second, under Washington law, a product seller other than a manufacturer may be liable to a claimant in certain circumstances, such as, when the seller is negligent. *See* Wash. Rev. Code § 7.72.040 (2002). Third, Defendants seem to overlook that in addition to the claim for products liability, Plaintiffs' complaint alleges three independent claims against each Defendant in this case, namely, a claim for violation of the Washington Consumer Protection Act, a claim for misrepresentation, and a claim for unjust enrichment. (*See* Pls.' Compl. ¶¶ 8.1-11.4.) Consequently, Defendants' bold statement that Thermal Ease may not be liable to Plaintiffs' in this case provides no support for Defendants' argument that the Court should declare Thermal Ease a nominal party.

Finally, Defendants argue that Thermal Ease is not a real party in interest in this action because, by law, all of its assets have been distributed to the company's sole shareholder, Defendant Hot Water Systems North America, Inc. In support of this argument, Defendants cite *Garbutt v. Southern Clays, Inc.*, 844 F. Supp. 1551 (M.D. Ga. 1994), where the court denied the plaintiffs' motion for remand based on a Georgia statute according to which claims against a dissolved corporation that has distributed all of its assets could be enforced against shareholders who have received those assets. *Id.* at 1552-53 (analyzing the pertinent Georgia statute).

Again, Defendants' argument does not persuade the Court for two reasons. First, the parties in *Garbutt* did not dispute that the assets of the dissolved corporation in question had been transferred to a third party. *See Garbutt*, 844 F. Supp. at 1552 (stating that the plaintiffs' complaint alleged "'that all of the assets of [the dissolved] Defendant, including the subject property, have been transferred without consideration . . . to [another person].'"). To the contrary, there is no evidence that Thermal Ease has been fully stripped of any assets that may satisfy a potential judgment against it.[4] Second, as Plaintiffs correctly point out, the *Garbutt* court's holding was based on a Georgia statute that differs significantly from the WBCA's provision addressing a dissolved corporation's amenability to law suits. The Georgia Business Corporation Code specifically limits claims against dissolved corporations as follows:

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[4] In fact, it appears that Thermal Ease is listed as the insured in at least three liability insurance policies, the aggregate amount of which sums up to several millions of dollars. (*See* Terrell Suppl. Decl. Exs. A-C.) The proceeds of those insurance polices definitely qualify as the assets potentially available to satisfy an adverse judgment against Thermal Ease in this action.

> [A] claim against a corporation in dissolution or against a dissolved corporation may be enforced under this Code section:
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> (1) Against the corporation, to the extent of its undistributed assets; or
> (2) If the assets have been distributed in liquidation, against a shareholder of the corporation to the extent of his pro rata share of the claim or the corporate assets distributed to him in liquidation, whichever is less, but a shareholder's total liability for all claims under this Code section may not exceed the total amount of assets distributed to him.

Ga. Code Ann. § 14-2-1407(c) (2002). In contrast, Wash. Rev. Code § 23B.14.050, which allows law suits against dissolved corporations does not make viability of claims against a dissolved corporation dependent upon the corporation's possession of assets. Consequently, Defendants' reliance on *Garbutt* is misplaced.

In sum, the Court concludes that Thermal Ease is a proper party in interest within the meaning of the federal removal statute, 28 U.S.C. 1441(b). Accordingly, the Court next analyzes whether Plaintiffs have properly served Thermal Ease with process before this action had been removed to this Court.

**B. The Proper Service of Process Requirement**

Defendants argue that Plaintiffs have failed to properly serve Thermal Ease with process upon the original commencement of this action in the King County Superior Court. Accordingly, Defendants maintain that the Court should not consider citizenship of Thermal Ease in determining, pursuant to 28 U.S.C. § 1441(b), whether any of Defendants joined in this case are citizens of the Washington state. The Court finds that Defendants' argument with respect to the improper service of process lacks merit.

Under Washington law, in a civil action against a corporation that does not fall within a certain category of businesses, process must be served on "the president or other head of the company or corporation, the registered agent, secretary, cashier or managing agent thereof or to the secretary, stenographer or office assistant of the president or other head of the company or corporation, registered agent, secretary, cashier or managing agent." Wash. Rev. Code § 4.28.080(9) (2002). Further, according to the WBCA, a corporation's registered agent "is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the corporation." Wash. Rev. Code § 23B.05.040(1) (2002). However, if the corporation's registered agent cannot be found with reasonable diligence at the registered office, the Washington Secretary of State becomes the corporation's agent for service of process. Wash. Rev. Code § 23B.05.040(2)(b) (2002). In the latter case, process should be served on the secretary of state by delivering it to the secretary of state or any other authorized clerk of the corporation department of the secretary of state's office. Wash. Rev. Code § 23B.05.040(3) (2002).

Here, Plaintiffs have submitted sufficient documentary evidence of the proper service of process on Defendant Thermal Ease. That evidence demonstrates that Plaintiffs initially attempted to serve Thermal Ease's registered agent, Harold D. McElwain. (*See* Terrell Suppl. Decl. Ex. D). Having found that Mr. Elwain does not reside or maintain an office at his last known address, Plaintiffs served the process on the Washington Secretary of State. (*See id.*) The Office of the Secretary of State has acknowledged receipt of the process in writing. (*See* Terrell Decl. Ex. 5.) These facts clearly indicate that Plaintiffs have complied with the Washington statutory requirements for service of process on corporations.

Accordingly, the Court concludes that in addition to being a real party in interest in this action, Thermal Ease has been properly served as Defendant in this action. The fact that Defendant Thermal Ease and both named Plaintiffs share citizenship of the same state destroys complete diversity and, therefore, the Court's subject-matter jurisdiction over this case. Consequently, based on the plain language of 28 U.S.C. § 1441(b), Defendants' removal of this action to this Court was improper and the case should be remanded to the Washington State King County Superior Court.

**C. Attorney Fees And Costs**

Plaintiffs have requested that the Court award them attorney fees and costs associated with filing their current motion for remand. Pursuant to 28 U.S.C. § 1447(c), the Court has discretion to require the removing Defendants to pay "just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Defendants urge the Court to deny Plaintiffs' request by arguing that they had a good faith basis for filing a removal petition in this case. This argument, however, overlooks the Ninth Circuit precedents interpreting the amended § 1447(c).

In *Moore v. Permanente Med. Group, Inc.*, the Ninth Circuit held that an award of attorney fees and costs under § 1447(c) is not predicated upon a district court's finding of bad faith in filing of the petition for removal. 981 F.2d 443, 448 (9th Cir. 1992). Furthermore, in a more recent opinion, the Ninth Circuit clearly pronounced that an award of attorney fees pursuant to § 1447(c) is improper only if a district court "based [it] on an erroneous determination of law – that is, if the district court wrongly determined that the case should be remanded to state court." *Balcorta v. Twentieth Century- Fox Corp.*, 208 F.3d 1102, 1105 (9th Cir. 2000). According to *Balcorta*, a district court's conclusion that the removal was erroneous as a matter of law fully justifies the court's award of fees and costs incurred by the plaintiff as a result of contesting the removal. *See id.* at 1106 n.6. Importantly, the *Balcorta* court specifically refuted Defendants' current "good-faith-basis-for-removal" argument. As the court explained, "our case law does permit an award of fees when a defendant's removal, while 'fairly supportable,' was wrong as a matter of law." *Id.* The U.S. District Court for the Western District of Washington has followed the Ninth Circuit's interpretation of § 1447(c). *See, e.g., Johnson v. Port of Seattle*, 261 F. Supp. 2d 1243, 1246 (W.D. Wash. 2003) (concluding that "[b]ecause removal of this case was wrong as a matter of law, the Court will award the unnecessary litigation costs imposed on plaintiff.").

Accordingly, the Court grants Plaintiffs' request for reasonable attorney fees and costs associated with the removal and remand of this action, conditioned upon Plaintiffs' filing with the Court an itemized statement of such litigation expenses as directed below.

IV. CONCLUSION

Plaintiffs' motion for remand (Dkt. No. 4) is hereby GRANTED. The Clerk is directed to mail a certified copy of this Order to the Clerk of the Washington State King County Superior Court. Within ten (10) judicial days of the date of this Order, Plaintiffs must file with the Court an itemized statement of the attorney fees and costs that they have incurred as a result of the attempted removal of this action.

SO ORDERED this 12 day of January, 2004.

CHIEF UNITED STATES DISTRICT JUDGE